

1 **UNITED STATES DISTRICT COURT**
2 **DISTRICT OF NEVADA**

3 GERALD JEROME POLK, JR.,

Case No.: 2:20-cv-01636-APG-NJK

4 Petitioner

Order

5 v.

6 STATE OF NEVADA, et al.,

7 Respondents

8
9 Petitioner Gerald Jerome Polk, Jr. has submitted a *pro se* petition for writ of habeas
10 corpus under 28 U.S.C. § 2254. ECF No. 1-1. However, Polk has failed to submit an application
11 to proceed *in forma pauperis* or pay the filing fee. Accordingly, this matter has not been
12 properly commenced. *See* 28 U.S.C. § 1915(a)(2) and Local Rule LSR1-2.

13 Thus, the present action will be dismissed without prejudice. Polk may file a new
14 petition in a new action, but he must include either the \$5.00 filing fee or a completed
15 application to proceed *in forma pauperis* on the proper form with both an inmate account
16 statement for the past six months and a properly executed financial certificate.

17 The present petition appears to be unexhausted. Polk is warned that a federal court will
18 not grant a state prisoner's petition for habeas relief until the prisoner has exhausted available
19 state remedies for all claims raised. *Rose v. Lundy*, 455 U.S. 509 (1982); 28 U.S.C. § 2254(b). A
20 petitioner must give the state courts a fair opportunity to act on each of the claims before she or
21 he presents those claims in a federal habeas petition. *O'Sullivan v. Boerckel*, 526 U.S. 838, 844
22 (1999); *see also Duncan v. Henry*, 513 U.S. 364, 365 (1995). A claim remains unexhausted until
23 the petitioner has given the highest available state court the opportunity to consider the claim

1 through direct appeal or state collateral review proceedings. *See Casey v. Moore*, 386 F.3d 896,
2 916 (9th Cir. 2004); *Garrison v. McCarthy*, 653 F.2d 374, 376 (9th Cir. 1981).

3 Polk states that he filed a state postconviction habeas corpus petition in January 2020.
4 The state-court docket appears to reflect that Polk's state postconviction petition is pending in
5 state court. Thus, he has not yet exhausted his state-court remedies. Further, the decision on his
6 state petition could render this action moot.

7 This federal petition is dismissed without prejudice as improperly commenced. It does
8 not appear from the papers presented that a dismissal without prejudice will materially affect a
9 later analysis of any timeliness issue with regard to a new action filed in a timely manner. Polk
10 remains responsible for properly exhausting his claims, for calculating the running of the federal
11 limitation period as applied to his case, and for properly commencing a timely-filed federal
12 habeas action.

13 I THEREFORE ORDER the Clerk to detach and file the petition (ECF No. 1-1).

14 I FURTHER ORDER that the petition is **DISMISSED** without prejudice.

15 I FURTHER ORDER that a certificate of appealability is DENIED.

16 I FURTHER ORDER the Clerk to SEND Polk two copies each of an application form to
17 proceed *in forma pauperis* for incarcerated persons and a noncapital Section 2254 habeas
18 petition form, one copy of the instructions for each form, and a copy of the papers that he
19 submitted in this action.

20 I FURTHER ORDER the Clerk to enter judgment accordingly and close this case.

21 Dated: October 27, 2020.



22 U.S. District Judge Andrew P. Gordon
23